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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-211797

DATE: December 23, 1983

MATTER OF: Travel for Service Members
on Appellate Leave

DIGEST:

1. The Military Justice Amendments of 1981, Public Law 97-81, added article 76a to the Uniform Code of Military Justice, which provides that court-martialed personnel sentenced to receive punitive discharges or dismissals may be compelled to take leaves of absence pending the completion of the appellate review of their cases, in contemplation of their eventual separation from service in absentia under less than honorable conditions. When they are placed on leave they may be provided personal transportation home at Government expense by the least costly means available, in the same manner as is generally authorized for persons separated under conditions other than honorable.
2. In the event a court-martialed service member who has been involuntarily placed on appellate leave under the Uniform Code of Military Justice is returned to a designated post for the purpose of participating in further judicial proceedings ordered in his case, or for other purposes of an official nature, his return travel may be regarded as having been performed under orders on official business while away from his designated post, so that his personal transportation at Government expense may be authorized.
3. Under the statutes and regulations currently in effect, service members stationed outside the United States who are separated under less than

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honorable conditions are authorized return transportation of their dependents and household goods under 37 U.S.C. 406(h), but such authority does not extend to those stationed within the United States. However, under the recently enacted provisions of 37 U.S.C. 406(a)(2)(A), members stationed in the United States who are separated under those conditions are authorized transportation of dependents by the least expensive transportation available, but not household goods. Court-martialed personnel sentenced to receive punitive discharges who are stationed outside the United States and who are placed on appellate leave to await final separation may be allowed transportation of dependents and household goods on that same basis. Such personnel stationed inside the United States and placed on appellate leave may be authorized dependents' transportation but not household goods transportation.

This action is in response to a request from the Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations) for a decision on the question of whether the Joint Travel Regulations may be amended to authorize travel and transportation at Government expense for court-martialed service members who are required to take leaves of absence under article 76a of the Uniform Code of Military Justice pending the completion of the appellate review of their cases.¹

We conclude that the Joint Travel Regulations may be amended to authorize these persons to be sent home in the

¹The request was forwarded here after being assigned Control Number 83-12 by the Per Diem, Travel and Transportation Allowance Committee.

same manner as authorized for individuals separated from service under other than honorable conditions, and to allow them transportation at Government expense in the event they are subsequently recalled for the purpose of attending further judicial proceedings or for other purposes of an official nature.

Background

The Assistant Secretary notes that the Military Justice Amendments of 1981, Public Law 97-81, approved November 20, 1981, 95 Stat. 1085, added article 76a to the Uniform Code of Military Justice (10 U.S.C. 876a), which provides that service members convicted of crimes in court-martial proceedings may be required to take leaves of absence pending the completion of appellate review, if their sentences include an unsuspended dismissal (officers) or an unsuspended bad-conduct or dishonorable discharge (enlisted personnel). The Joint Travel Regulations currently do not authorize these persons to be sent home at Government expense.

The Assistant Secretary further notes that prior to enactment of the Military Justice Amendments of 1981, these individuals were encouraged to take leaves of absence pending the completion of the appellate review of their cases after they had served any confinement adjudged, since they were not considered fit for return to duty because of the punitive discharge or dismissal included in their court-martial sentences. Those who volunteered to take leave were allowed to go home and were ordinarily separated from service in absentia after the appellate review was completed. Those who declined to take leave had to be restored to duty while awaiting the results of their appeals.

The Assistant Secretary observes that in 1959 we were asked to render a decision on the question of whether the Joint Travel Regulations could then be amended to authorize travel at Government expense for court-martialed personnel who volunteered to take appellate leave, either under the statute authorizing home travel upon separation from service or under some other statute. At the time it was pointed out to us that many of these persons would be without funds as a result of their courts-martial and that they would often

have difficulties getting home without Government assistance. However, in decision B-139244 of July 29, 1959, we held that the regulations could not be so amended because there was no statutory basis for allowing travel at Government expense to persons who volunteered to take leave in those circumstances.

In requesting the present decision, the Assistant Secretary suggests that there has been a significant change in the circumstances of these court-martialed individuals, since the 1981 legislation now permits them to be placed on appellate leave involuntarily. He therefore questions whether the Joint Travel Regulations may now be amended to authorize travel at Government expense to send these individuals home when they are placed on appellate leave, and to bring them back in the event they are recalled for a new trial or for other official purposes. In addition, he questions whether the regulations may also be amended to authorize the transportation of dependents and shipment of household goods in these circumstances.

Personal Travel

Subsections 404(a)(3) and 404(f) of title 37, United States Code, provide that under regulations prescribed by the Secretaries concerned, a member of a uniformed service who is separated or released from active duty under conditions other than honorable may be provided transportation in kind by the least expensive means available, or a monetary allowance not in excess of the cost of that transportation which is to be paid only for travel actually performed, for travel to his home or the place from which he was called or ordered to active duty. In addition, subsection 404(a)(1) generally provides that travel allowances may be authorized by regulation for a service member whenever he is "away from his designated post" under orders on official business.

Implementing regulations are contained in Volume 1 of the Joint Travel Regulations (1 JTR). Paragraphs M5300 to M5304, 1 JTR, in general authorize service members discharged under other than honorable conditions to be transported at Government expense by the least expensive mode available from their places of separation to their homes of record. However, the regulations do not authorize any service members to travel at Government expense while on leave

except in certain limited circumstances because leave is ordinarily granted for a member's personal convenience or accommodation and leave travel is normally not to be regarded as a matter of public or official business. See, generally, 36 Comp. Gen 257 (1956), 49 id. 744 (1970), 55 id. 1332 (1976), and 60 id. 648 (1981). In our 1959 decision B-139244, cited above, we expressed the view that even though court-martialed service members who had been sentenced to be separated under other than honorable conditions may then have been encouraged to take leaves of absence pending the completion of the appellate review of their sentences, their election to take leave nevertheless essentially remained a matter primarily of personal choice, convenience, or accommodation. We said that "the persons involved would be in a voluntary leave status," and that we knew of "no statutory authority for transportation at Government expense for travel incident to such a leave status." We therefore concluded that their travel at Government expense could not properly be authorized by regulation under the governing provisions of statute either as separation travel or as travel on official business.

Congress added article 76a to the Uniform Code of Military Justice with enactment of the Military Justice Amendments of 1981, Public Law 97-81, to give military commanders the authority to compel court-martialed service members with sentences including punitive dismissals or discharges to take leaves of absence pending the completion of appellate review, so that these persons adjudged as unfit to serve would no longer have the option of being restored to duty while awaiting the outcome of their appeals. The intent of the Congress, as reflected in the legislative history of article 76a, is that all appellate leave be involuntarily imposed in contemplation of final separation from service under other than honorable conditions. However, it is also intended that since persons on appellate leave still have a residual status as military members, in appropriate circumstances they may be brought back for further judicial hearings, for medical evaluation and treatment, or for other purposes of an official nature. See H.R. Rep. No. 306, 97th Cong., 1st Sess. 1-4, reprinted in 1981 U.S. CODE CONG. & AD. NEWS 1769-1772.

It thus appears that appellate leave has become a method formally sanctioned under the Uniform Code of

Military Justice by which the Armed Forces can compel those adjudged as unfit to leave the military environment even though not finally discharged. Since it is now imposed involuntarily in prospect of the accused's final separation from service, and the accused can be barred from ever returning to duty of his own volition in the meantime, it is our view that an accused placed on appellate leave may now be sent home at Government expense under 37 U.S.C. 404(a)(3) and 404(f) as a member separated or released from active duty under less than honorable conditions. We would therefore now have no objection to amendment of the Joint Travel Regulations to authorize the individuals in question to have the same personal home travel entitlements when they are placed on appellate leave as are authorized for persons who have been separated or discharged under other than honorable conditions.

In addition, we would have no objection to amendment of the Joint Travel Regulations to authorize travel in a reasonably appropriate manner at Government expense for these persons in the event they are recalled under orders to a designated post from appellate leave for the purpose of participating in further judicial proceedings in their cases or for other purposes of an official nature. Although service members returning to their posts of duty from voluntary leaves of absence are ordinarily responsible for paying their own personal traveling expenses, appellate leave is now involuntary and, as indicated, recall from that leave would be for purposes related to public business. Hence, return travel at Government expense could be authorized by regulation for the individuals in question in the event they are recalled, on the basis of 37 U.S.C. 404(a) as travel under orders.

Transportation of Dependents and
Household Goods

Prior to 1964 we held that there was no statutory basis for authorizing transportation of dependents and household goods at Government expense for a service member separated under less than honorable conditions, notwithstanding that those dependents were sometimes left stranded in a foreign country. See 37 Comp. Gen. 21 (1957), and 42 id. 568, 571 (1963).

Public Law 88-431, approved August 14, 1964, 78 Stat. 439, added subsection 406(h) to title 37 of the United States Code, which generally provides that the dependents and household effects of a service member stationed overseas may be returned to the United States at Government expense whenever the Secretary of his service determines that this would be in the best interests of all concerned. We then held that under 37 U.S.C. 406(h) regulations could be issued authorizing service members stationed overseas who were separated under less than honorable conditions to have their dependents and household goods returned to the United States at Government expense. See 44 Comp. Gen. 724 (1965), 55 id. 1183 (1976), and B-131632, November 30, 1977. Regulations based on those decisions are currently contained in subparagraphs M7103-2 (item 8) and M8303-1, 2, and 8, 1 JTR, which authorize the transportation of dependents and household goods from overseas duty stations for persons separated under conditions less than honorable, generally in the same manner as is authorized for a return from overseas in emergencies and other unusual circumstances.

Section 121 of the Uniformed Services Pay Act of 1981, Public Law 97-60, approved October 14, 1981, 95 Stat. 999, added subsection 406(a)(2)(A) to title 37 of the United States Code, which specifically authorizes a service member who is separated or released from active duty under less than honorable conditions to be furnished transportation in kind for his dependents by the least expensive means available, or to be paid a monetary allowance in an amount that does not exceed the cost of that transportation. However, the statute was not amended to authorize shipment of such members' household goods. Implementing regulations currently contained in subparagraphs M7009-5 and M8261-5, 1 JTR, authorize the dependents of service members separated at stations within the United States under less than honorable conditions to be transported to the members' homes by the least costly mode available, but prohibit any shipment of household goods within the United States in that situation.

For the reasons previously discussed, we would now have no objection to amendment of the regulations to authorize persons who are stationed within the United States and who are involuntarily placed on appellate leave to await their final separation from service under less than

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honorable conditions to be allowed transportation home of their dependents by the least expensive means available, as provided by the new provisions of 37 U.S.C. 406(a)(2)(A). However, since no statutory authority was enacted to provide for transportation of such members' household goods, the regulations may not be amended to authorize transportation of their household goods at Government expense.

The questions presented are answered accordingly.

for Harry R. Van Cleave
Comptroller General
of the United States